Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Computer III Further Remand	)	CC Docket No. 95-20
Proceedings: Bell Operating Company	)	
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	CC Docket No. 98-10
Review of Computer III and ONA	)	
Safeguards and Requirements	)	

COMMENTS OF U S WEST, INC.

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SUMMARY

U S WEST, Inc. ("U S WEST") hereby submits its comments in response to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking in the above-referenced proceeding.

U S WEST fully supports the Commission's proposals to eliminate unnecessary Open Network Architecture ("ONA") requirements and Computer III safeguards (collectively, the "Computer Rules") as part of the biennial review of regulations mandated by Congress in Section 11 of the Telecommunications Act of 1996 ("1996 Act"). Section 11 establishes a statutory presumption that regulation is not necessary, and a statutory command that unnecessary regulations must be eliminated. The deregulatory presumption is further buttressed by Section 706 of the 1996 Act, which directs the Commission to eliminate any regulation which stands in the way of the deployment of advanced telecommunications services to all Americans.

U S WEST concurs with the Commission's tentative conclusion to continue with non-structural safeguards, rather than re-imposing structural separation. The Commission's existing regulatory regime has been effective in providing enhanced service/information service providers ("ESP") with the network functions they require. In addition, giving Bell Operating Companies ("BOC") the flexibility to provide enhanced services on an integrated basis produces significant public interest benefits by facilitating the introduction of new services.

At the same time, U S WEST urges the Commission to address weaknesses

in its regulatory classification of services which produce significant disparities in the regulation of what are becoming increasingly similar functions and services. First, the Commission should resolve the protocol conversion conundrum by confirming the basic status of protocol conversion offered as part of enhanced services. Second, the Commission should resolve the problem of the ESP exemption from access charges, which is encouraging carriers to classify themselves as ESPs.

In addition, the Commission should not expand its existing ONA unbundling requirement. The Commission has complied with the Ninth Circuit's Remand Order by identifying compelling reasons for retaining the current level of unbundling. The 1996 Act, as well as other regulatory and market-based developments, have brought about a dramatic increase in the number of competitors providing the basic network services that ESPs previously could obtain only from incumbent local exchange carriers. Further, as the Commission itself noted, the level of competition within the enhanced service market has exploded as new competitive ESPs continue to pour into the market. Moreover, ESPs have the option of taking advantage of the unbundling and interconnection provisions of Section 251 of the Act by entering into a partnership arrangement with a carrier or by expanding its offerings to include telecommunications services. However, pure ESPs cannot obtain access to unbundled elements under Section 251 without being required to satisfy the corresponding obligations of carriers.

U S WEST supports the Commission's proposal to eliminate the comparably efficient interconnection ("CEI") plan filing requirement. The Commission reasoned correctly that CEI plans are no longer necessary to protect against access

discrimination. Moreover, the filing of CEI plans entails substantial administrative costs, causes harmful regulatory delays, and has the anti-competitive effect of forcing BOCs to reveal their product deployment plans well in advance of market entry. Thus, the Commission should dismiss all pending CEI plan matters and immediately remove the burden imposed by existing CEI plans.

In accordance with the biennial review process, the Commission should streamline its existing CEI parameters and Computer III safeguards in a number of respects. First, the CEI parameters of interface functionality and technical characteristics are satisfied by the non-discrimination and network disclosure safeguards. Second, the CEI parameters of unbundling of basic services, resale, end user access, CEI availability, minimization of transport costs, and recipients of CEI are satisfied through compliance with state tariffing requirements. Third, the CEI parameter of installation, maintenance and repair is encompassed in the non-discrimination safeguard and satisfied through internal practices and reporting requirements.

With respect to non-structural safeguards, U S WEST supports the Commission's tentative conclusion that the network disclosure rules adopted pursuant to Section 251(c)(5) of the 1996 Act should supersede the network disclosure rules established in the Computer III proceeding. The non-discrimination safeguard should be preserved, but the Commission's existing reporting requirements should be streamlined. Further, the semi-annual reports, and the annual report should be consolidated into a new streamlined annual ONA report. The non-structural safeguards of Customer Proprietary Network

Information and the allocation of joint and common costs are being addressed in separate proceedings and, therefore, are not discussed herein.

U S WEST believes that paper filings and Commission approval of ONA amendments should be eliminated to minimize the disruption on the deployment of new enhanced services. When a new basic service is deployed, U S WEST's compliance with non-structural safeguards and tariffing requirements should be sufficient. In the alternative, U S WEST proposes that a list of ONA services be available on an Internet homepage.

U S WEST also recommends that the Commission eliminate the requirement that all ONA services be tariffed on an interstate basis. For those ONA services which constitute general exchange-type offerings, U S WEST proposes to offer such service only in intrastate general exchange tariffs (or otherwise in conformance with applicable state law and regulation).

Finally, Southwestern Bell's bill of attainder lawsuit requires no modification of the Commission's approach to the Computer Rules. Consistent with the Texas Court's decision in that case, the rules adopted in this proceeding should not single out any particular category of telecommunications carriers for disparate treatment.

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COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its comments in response to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking in the above-referenced proceeding.[1]

U S WEST fully supports the Commission's proposals to eliminate unnecessary Open Network Architecture ("ONA") requirements and Computer III safeguards (collectively, the "Computer Rules") as part of the biennial review of regulations mandated by Congress in the Telecommunications Act of 1996 ("1996 Act"). As the Commission has recognized, significant changes have occurred in the telecommunications industry since the Commission's 1995 Notice of Proposed

[1] In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20 and 98-10, Further Notice of Proposed Rulemaking, FCC 98-8, rel. Jan. 30, 1998 ("Computer III Further Notice").

Rulemaking in the Computer III Remand proceeding.[2] Of particular importance, the 1996 Act implemented an entirely new framework of non-structural safeguards to foster competition throughout the telecommunications industry. These statutory safeguards address many of the same concerns as the safeguards established in the Commission's Computer III and ONA proceedings.[3] In those cases where Congress thought structural separation to be appropriate, it said so explicitly.

The 1996 Act also directed the Commission to review all of its regulations every two years and to eliminate those which could not be found useful. Congress clearly intended the biennial review process to be comprehensive in scope -- the Commission is directed to review "all regulations" and to repeal or modify any such regulations that are "no longer necessary in the public interest."[4] U S WEST believes that three fundamental principles should guide the Commission's review process in this proceeding. First, the Commission should seek to eliminate wherever possible regulatory requirements that unnecessarily burden carriers in today's highly-competitive environment. Second, the Commission must ensure that particular categories of telecommunications carriers are not unfairly disadvantaged in the marketplace by unnecessary regulations. Third, the Commission should avoid rigid regulatory classifications of services that distinguish among what are becoming increasingly similar functions and services based on the technology used to provide the service. Many of the Commission's tentative conclusions in the

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[2] Id. ¶ 3.

[3] Id. ¶ 5.

[4] 47 U.S.C. § 161.

Computer III Further Notice would improve the current enhanced services regulatory scheme in a manner consistent with these principles.[5]

I. INTRODUCTION

The Commission has been grappling with issues related to the Bell Operating Companies' ("BOC") provision of so-called "enhanced" or "information" services (e.g., voice messaging, data processing) for more than a decade.[6] It has been the Commission's objective to permit the BOCs to compete in the market for unregulated enhanced services while ensuring that the BOCs do not have an unfair advantage in the provision of these services by virtue of their market power in the local exchange market.[7] The Commission originally addressed this concern in the Computer II proceeding by requiring the establishment of structurally separate affiliates in order to provide enhanced services.[8]

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[5] The Commission should clarify that, pursuant to Section 276(b)(1)(C) of the Act, any changes made to the Computer Rules in the instant proceeding (e.g., elimination of the CEI plan filing requirement) also will apply to the non-structural safeguard regime for BOC provision of payphone service. While Section 276(b)(1)(C) makes particular reference to the non-structural safeguards adopted in CC Docket No. 90-623, the Commission has interpreted this statutory provision as extending its Computer Rules generally to BOC payphone services. Payphone Order, CC Docket No. 96-128, Sep. 20, 1996. To avoid any issue of statutory compliance, however, the Commission should expressly incorporate any rule changes adopted in the instant proceeding into CC Docket No. 90-623.

[6] U S WEST uses the terms "enhanced services" and "information services" interchangeably herein, as the Commission did in the Computer III Further Notice.

[7] Computer III Further Notice ¶ 9.

[8] In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384, 475-486 ¶¶ 233-60 (1980) ("Phase II Final Order"), on recon., 84 F.C.C.2d 50 (1980), on further recon., 88 F.C.C.2d 512 (1981), affirmed sub nom., Computer and

In Computer III, the Commission determined that the costs of structural separation outweighed the benefits, and that non-structural safeguards would adequately protect competing enhanced service/information service providers ("ESP") from improper cost allocation or discrimination by the BOCs.[9] The Commission implemented a system of non-structural safeguards whereby BOCs were first required to obtain Commission approval of service-specific comparably efficient interconnection ("CEI") plans as a pre-condition for offering a new enhanced service, and then to develop and implement ONA plans outlining how the BOC would unbundle and make available network services to competing ESPs.[10] In return, the BOCs were permitted to provide enhanced services integrated with their

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Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[9] In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958, 964-65 ¶¶ 3-5 (1986) ("Computer III Phase I Order"), modified on recon., 2 FCC Rcd. 3035 (1987) ("Phase I Recon. Order"), on further recon., 3 FCC Rcd. 1135 (1988), second further recon., 4 FCC Rcd. 5927 (1989), Computer III Phase I Order and Phase I Recon. Order, vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990), Phase II Order, 2 FCC Rcd. 3072 (1987) ("Phase II Report and Order"), modified on recon., 3 FCC Rcd. 1150 (1988) (Phase II Reconsideration Order"), Phase II Further Recon. Order, 4 FCC Rcd. 5927 (1989), Phase II Order, vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd. 7719 (1990), on recon., 7 FCC Rcd. 909 (1992), pets. for review denied, sub nom. California v. FCC, No. 90-70336, slip op. 9th Cir. Sep. 23, 1993, Report and Order, 6 FCC Rcd. 7571 (1991), vacated in part and remanded sub nom. People of State of Cal. v. FCC, 39 F.3d 919 (9th Cir. 1994) ("California v. FCC"), cert. denied, 514 U.S. 1050 (1995).

[10] Computer III Phase I Order at 964-65 ¶¶ 5-6, 1080-86 ¶¶ 246-55. Once a BOC's ONA plan was approved by the Commission, the BOC no longer needed to obtain Commission approval prior to offering specific enhanced services.

basic network facilities.[11]

The Commission eventually granted relief from structural separations requirements for individual BOCs based on its approval of their ONA plans. In 1994, however, the Ninth Circuit Court of Appeals found that the Commission had modified its original ONA requirements so that ONA "no longer contemplates fundamental unbundling."[12] The Court remanded the proceeding to the Commission because it concluded that the Commission had not adequately explained why this apparent shift did not undermine its decision to rely on ONA safeguards as the basis for granting relief from structural separations requirements.[13] In response to the Ninth Circuit's decision, the Commission reinstated the requirement that BOCs must file CEI plans before providing specific enhanced services on an integrated basis.[14] The Commission also commenced the instant proceeding to address the issue of the sufficiency of ONA unbundling as a condition of lifting structural separation.[15]

As the Commission noted in the Computer III Further Notice, a number of

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[11] Id. at 962-63 ¶ 2.

[12] California v. FCC, 39 F.3d at 930.

[13] Id. However, the actual Commission decision to eliminate structural separations had been appealed to the D.C. Circuit. These decisions were not reviewed judicially.

[14] In the Matter of Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order, 10 FCC Rcd. 1724 (1995) ("Interim Waiver Order").

[15] In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, 10 FCC Rcd. 8360 (1995) ("Computer III Remand Notice").

significant events have occurred to alleviate any concern about the sufficiency of ONA unbundling:

- Congress adopted the 1996 Act, which has brought about a dramatic increase in the number of competitors providing the basic network services that ESPs previously could obtain only from incumbent local exchange carriers ("LEC");
- Other regulatory and market-based developments, such as the Expanded Interconnection proceeding, help to further protect ESPs against discrimination by facilitating competition in the provision of basic network services; and
- The level of competition within the enhanced services market has exploded as new competitive ESPs, such as Internet service providers ("ISPs"), continue to pour into the market.[16]

In light of these developments, the Commission has more than sufficient evidence to support its previous determination regarding the appropriate level of ONA unbundling.

The Commission also is required to eliminate unnecessary Computer Rules as part of the biennial review process. U S WEST supports the Commission's deregulatory proposals to eliminate the requirement that BOCs file CEI plans and obtain approval for these plans prior to providing new intraLATA enhanced services, as well as the network information disclosure rules that preceded the rules adopted pursuant to Section 251(c)(5) of the 1996 Act.[17] In addition, as discussed further below, U S WEST has identified other ONA requirements and non-structural safeguards that should be streamlined or modified. At the same time, U S WEST urges the Commission to avoid taking a giant step backward by

[16] Computer III Further Notice ¶¶ 29-36.

resurrecting structural separation or creating new ONA requirements.

II. THE TELECOMMUNICATIONS ACT OF 1996 REQUIRES THAT THE COMMISSION USE THIS PROCEEDING AS A VEHICLE TO REDUCE REGULATION

One of the key issues recognized in the Computer III Further Notice is the fact that the statutory structure has changed dramatically since the Commission last visited the Computer Rules.[18] The Computer Rules developed in an era where there was almost a presumption that regulations should be continued until it could be demonstrated conclusively that they were not useful under any conceivable circumstances. The basis for the general statutory principle that the Administrative Procedure Act required no less support for deregulation than for regulation was established in the Supreme Court's 1983 Motor Vehicles decision.[19] In effect, this decision made deregulation as difficult as regulation. The Ninth Circuit Court of Appeals, relying on the Motor Vehicles decision, issued a string of decisions which made it virtually impossible for the Commission to eliminate the Computer II structural separation rules long after such rules had been proven, not only useless, but counterproductive and harmful.[20]

This difficult scenario was fundamentally changed by Section 11 of the 1996 Act, which establishes a statutory presumption that regulation is not necessary, and a statutory command that regulations be eliminated which are not proven to be

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[17] Id. ¶ 7.

[18] Id. ¶ 4.

[19] Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983).

still necessary.[21] Section 11 is nothing less than a congressional directive that the presumption which Motor Vehicles established -- that a regulation would be considered valid until it could be demonstrated on the record that it was no longer necessary -- is not valid in the telecommunications world. Rather, no regulation can remain on the books unless the record affirmatively establishes the continued necessity for the rule in question.

The instant proceeding is being conducted pursuant to this new statutory structure.[22] U S WEST fully supports the Commission's deregulatory initiative, although we share Commissioner Furchtgott-Roth's concern that the Commission's deregulatory efforts may be too limited to satisfy the demands of either the marketplace or the 1996 Act. In the specific context of the Commission's comprehensive review of its Computer Rules, the strictures of Section 11 of the 1996 Act serve as far more than a simple exhortation that the Commission deregulate where regulation is no longer necessary, although that exhortation is both firm and mandatory. The Motor Vehicles presumption has been reversed by Congress, and no aspect of the Computer Rules can remain on the books simply because the regulation is already there.

This reversal of presumptions is further buttressed by Section 706 of the 1996 Act. Section 706, which amends an existing statutory provision that

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[20] See, e.g., California v. FCC, 905 F.2d at 1231, 1233-34, 1238-39; California v. FCC, 39 F.3d at 925, 928-30.

[21] 47 U.S.C. § 161(a)(2).

[22] Computer III Further Notice ¶ 6.

permitted the Commission to adopt rules impeding the deployment of new technology only in the most extreme circumstances,[23] now affirmatively directs the Commission to eliminate any regulation (on a preemptive basis if necessary) and to waive any statutory provision which stand in the way of the deployment of advanced telecommunications services to all Americans.[24] The underlying assumption of Section 706 -- a correct one, unfortunately -- is that unduly burdensome regulations have operated to deprive many American citizens of new and beneficial services. Therefore, the Commission is directed by the 1996 Act to ensure that its existing regulations do not prevent or inhibit the beneficial deployment of new services to the public.

III. STRUCTURAL SEPARATION REQUIREMENTS ARE UNNECESSARY AND HARMFUL TO THE PUBLIC INTEREST

U S WEST concurs with the Commission's tentative conclusion that it would be preferable to continue with non-structural safeguards, rather than re-imposing structural separation.[25] More than ten years ago, the Commission found that the need for structural separation had decreased due to technological and market developments that prevented the BOCs from misallocating costs and engaging in access discrimination.[26] The subsequent elimination of the sharing mechanism

[23] Amending 47 U.S.C. § 157 note.

[24] Id.

[25] Computer III Further Notice ¶ 59.

[26] Computer III Phase I Order, 104 F.C.C.2d at 1010-12 ¶¶ 95-99.

completely eliminated the BOCs' incentive to misallocate costs.[27]

U S WEST's experience under the Commission's existing non-structural safeguards regime lends further support to the conclusion that a return to structural separation would be unnecessary to ensure that ESPs have access to basic network services. The burgeoning growth of the ESP industry demonstrates the evolution of enhanced services as originally envisioned by the Commission in the Computer III proceeding. This growth has occurred coincident with a decline in requests for ONA services.

U S WEST, for example, received only one request through the 120-day process for a new ONA service (basic serving arrangement "BSA," or basic service elements "BSE") in 1996, and none in 1997. The 1996 request was for ATM service, which was developed and deployed as a tariffed basic service in 1996.[28] Based on U S WEST's experience, as reported in its most recent Annual ONA Report, it is apparent that the ESP industry's needs are being satisfied to a great extent via existing tariffed services, of which some are ONA services, as well as emerging new

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[27] See In the Matter of Price Cap Performance Review for Local Exchange Carriers, Access Charge Reform, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd. 16642, 16699-703 ¶¶ 147-155 (1997), appeals pending sub nom., United States Telephone Association, et al. v. FCC, et al., Nos. 97-1469, et al. (D.C. Cir).

[28] U S WEST Annual ONA Report filed on April 15, 1997. Approximately 41 requests submitted from 1990 through 1995 continue to be categorized as "technically infeasible." U S WEST continues to work with requesting ESPs, equipment manufacturers, and the Network Interconnectivity Interoperability Forum ("NIIF") to meet those requests that satisfy the criteria for ONA services. Id. at 5.

services (e.g., xDSL services).[29] Thus, it is clear that the current ONA process has been effective in providing ESPs with the network functionalities they require.[30]

In addition, interconnection and unbundled services are available to ESPs that are also telecommunications services providers.[31] Thus, there is no need for the Commission to revert back to the structural separation requirements of Computer II to ensure that the ESP industry has access to the same network capabilities as the BOCs' enhanced services operations.

Further, the NIIF has been effective in helping ESPs obtain basic services from the BOCs and GTE.[32] One of the NIIF's missions is to support and facilitate those issues brought forward by the ESP community. There are several carrier participants in the NIIF that champion ESP issues and ensure that such issues are addressed on equal footing with those of LECs and interexchange carriers ("IXC"). Conversely, there have been instances where issues have not been moved along due to lack of contributions and attendance from the ESP community.

Giving BOCs the flexibility to provide enhanced services on an integrated basis also produces significant public interest benefits by encouraging the introduction of new services. A study previously conducted by Booz-Allen & Hamilton examined the performance of the enhanced services markets since the

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[29] U S WEST currently has pending a petition which would permit it to expand its DSL offerings. U S WEST Petition for Relief from Barriers to Deployment of Advanced Telecommunications Services, filed Feb. 25, 1998.

[30] Computer III Further Notice ¶¶ 86-88.

[31] Id. ¶ 33.

[32] Id. ¶ 89.

BOCs have been permitted to provide integrated enhanced services.[33] The study found that the revenues for the ESP market (including voice messaging, audiotext, online data base access and transaction processing, e-mail, EDI, and enhanced fax) grew at an annual rate of over 18% between 1991 and 1994, with a value of over $25.4 billion in 1994.[34] Despite this significant growth, the study found that the BOCs collectively had less than 10% of the market and no specific BOC had more than 2% of the market.[35]

The study concluded that the market (particularly the voice messaging market) is more robust and competitive, with lower prices and a wider variety of services, then would have been the case had the BOCs not participated.[36] Since the time when the BOCs entered the ESP market, the revenues for the voice messaging market, which includes business voice mail equipment, telephone answering devices, voice messaging services, service bureaus, and interLATA and independent LECs' national voice messaging services, grew from $2.7 billion in 1990 to $4.1 billion in 1994.[37] Because of the lower prices that resulted with the BOCs' entry into the voice messaging market, the previously underserved residential and small business segments grew from 1.0 million subscribers in 1990 to 4.2 million

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[33] See Attachment A. Booz-Allen recently confirmed the ongoing validity of its study. See Letter to Mr. Frank Hatzenbuehler, U S WEST, from Robert G. Docters, Booz, Allen & Hamilton Inc. dated Sep. 2, 1997 at Attachment A.

[34] Attachment A at II-3.

[35] Id. at V-1.

[36] Id. at II-4.

[37] Id. at III-1.

subscribers in 1994, and from 740,000 small business customers in 1990 to 1.8 million such customers in 1994, respectively.[38] Of particular interest is the study's conclusion that a variety of rural and low-income consumer groups would not have been served in the voice messaging service arena if the BOCs had been precluded from participation.[39]

On the other hand, the resurrection of structural separation would impose substantially increased transaction and production costs on BOCs. In order to examine the costs of structural separation in its own business, U S WEST conducted an internal study in 1995 of the one-time costs which would be incurred if it were to create a fully separate subsidiary whose sole purpose was to deliver enhanced services to the public.[40] Assuming that the separate entity would employ 2,500 people (the smallest number which was deemed reasonable for a U S WEST affiliate on a long-term basis), this study concluded that the one-time costs of establishing such a subsidiary would be between $59 and $90 million.[41] These costs reflect only the start-up costs of a new subsidiary, not increases in ongoing operating costs caused by operational inefficiencies which structural separation imposes.

U S WEST's findings were confirmed by a study prepared by Jerry A. Hausman and Timothy J. Tardiff ("Tardiff Study") which concluded that structural

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[38] Id. at III-5 - III-7.

[39] Id. at III-9.

[40] See Attachment B.

[41] Id. at 3.

separation in the telecommunications market has cost billions of dollars.[42] Further, the Tardiff Study demonstrates that structural separation would add at least 30% to the BOCs' costs of developing and marketing enhanced services to the public.[43] The bottom line is that there is no evidence to justify a return to the world of structural separation, and the public interest clearly would be served by the Commission's continued reliance on non-structural safeguards.

IV. THE REGULATORY CLASSIFICATION OF SERVICES IS, BY ITSELF, CREATING MARKET DISTORTIONS WHICH TRANSCEND THE ACCURACY OF THE CLASSIFICATIONS THEMSELVES

Much of the Computer III Further Notice focuses on questions relating to the appropriate regulatory classification of services. Are enhanced services and information services the same?[44] Are basic services and telecommunications services the same?[45] Should information service providers be allowed to purchase unbundled network elements without assuming the obligations of telecommunications providers?[46] How does conversion of communications protocols -- the sine qua non of data transmission services -- fit into any of these questions, if at all? Related definitional issues that are not directly addressed in the Computer III Further Notice include the disconcerting decisions of some state regulators, with the encouragement of entities such as AT&T, to require that deregulated enhanced

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[42] See Attachment C at 3, 14.

[43] Id. at 21.

[44] Computer III Further Notice ¶ 42.

[45] Id. ¶ 41.

[46] Id. ¶ 42.

services be treated as telecommunications services for purposes of applying the resale rules of Section 251(c)(4) of the Act.[47]

The protocol conversion anomaly, the continued existence of the ESP exemption from switched access charges and the recent development of packetized voice service are part of a structure wherein it is becoming more and more likely that the rules and definitions adopted by this Commission, rather than the market itself, will drive technology, services and the market. Because U S WEST contends that such a regulator-driven market would be the total antithesis of the deregulatory and market-focused structure envisioned by Congress in the 1996 Act, U S WEST comments briefly on the overall series of definitional anomalies which the Commission must be careful to avoid perpetuating or creating.

U S WEST completely agrees that there is no material difference between information services under the 1996 Act and the Commission's long-standing definition of enhanced services,[48] with the significant exception that the information services definition can apply to services which are not offered over common carrier facilities. Attempting at this juncture to differentiate between information services and enhanced services would serve no purpose other than to distract everyone from

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[47] U S WEST notes that the Telecommunications Resellers Association recently filed a petition requesting that the Commission issue a declaratory ruling that incumbent LECs must make voice messaging services available for resale at wholesale rates, pursuant to Section 251(c)(4), on the grounds that voice messaging is a telecommunications service. Public Notice, Petition for Declaratory Ruling of the Telecommunications Resellers Association, DA 98-520, rel. Mar. 17, 1998.

[48] Computer III Further Notice ¶ 42. Likewise, U S WEST agrees with the Commission that the meaning of the statuory term "telecommunications services" is substantially similar to the Commission's definition of "basic services." Id.

addressing the far more serious issues raised by the technological differentiation among services inherent in both the Computer Rules and the 1996 Act.

The problems that must be addressed in the instant proceeding are the weaknesses in the basic/enhanced dichotomy and the 1996 Act's telecommunications services/information services dichotomy, both of which produce significant disparities in the regulation of what are becoming increasingly similar functions and services based on the technology used to provide the services. This weakness was mostly an annoyance at the beginning of the Computer II regime, but it has now reached crisis proportions because the definitions themselves are now driving the technology -- the opposite result from what the Commission has always intended and what Congress has expressly commanded. There are two specific issues that must be addressed.

First, the Commission must address and solve the protocol conversion conundrum. Carrier services which support multiple interfaces simultaneously are now treated differently than carrier services which support only one interface, an utterly indefensible position in the modern data telecommunications world. Moreover, as the AT&T Frame Relay decision illustrates,[49] the identical service containing the identical protocol conversions can be classified as either basic or enhanced, depending on the identity of the provider. The ability of a carrier to

[49] In the Matter of Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service; and American Telephone and Telegraph Company, Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition, Memorandum Opinion and Order, 10 FCC Rcd. 13717 (1995).

support more than one interface -- which is really what the protocol conversion debate is all about -- should not dictate the regulatory classification of its service. This is particularly true in the case of dominant LECs, who must split their data offerings into regulated and deregulated components whenever more than one interface is supported. The enhanced classification of protocol conversions is particularly burdensome because it creates ONA and CEI difficulties for divested BOCs and GTE.

When the enhanced status of protocol conversion was last debated, the stakes were quite different than they are now. Most significantly, the Commission was concerned that the approach most recently considered -- that at least some protocol conversions be treated as adjunct to basic services when offered by a dominant carrier -- might lead to state regulation of some value-added network providers as carriers.[50] This concern has now been mooted, because the Commission lost the preemption battle in the Ninth Circuit Court of Appeals.[51] There was also a concern that LECs might unfairly compete in the packet switching arena if protocol conversion were a basic service, a concern which has likewise become moot. Moreover, it does not appear that any ESPs still rely solely on the existence of a protocol conversion in their services to justify enhanced status.

U S WEST suggests that the Commission deal with protocol conversions in a straightforward manner. Whenever a BOC or GTE offers a carrier service which

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[50] See Phase II Order, 2 FCC Rcd. at 3074 ¶ 15, 3078 ¶ 46, 3080 ¶ 57.

supports multiple interfaces, it should be permitted to do so without any CEI, waiver or other regulatory requirements, so long as it notifies the Commission via a public filing and makes the full service, including the protocol conversion, available on a common carrier basis. Such a simple approach should permit incumbent LECs to offer new data services with a minimum of regulatory intrusion, while at the same time doing as little as possible to disrupt the status quo. In other words, protocol conversion offered adjunct to a basic service would essentially share the basic status of the associated service.[52]

Second, the problem of the ESP exemption must be resolved.[53] To the extent that an ESP is providing the same service as a carrier (especially if two-way voice traffic is involved), the ESP is receiving a gigantic benefit from the Commission in the form of an exemption from access charges. Carriers will be more and more drawn to classify themselves as ESPs and to choose "ESP technology" such as packet switching, not because of any principled basis for the classification, but

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[51] See California v. FCC, 905 F.2d at 1239-42. It is possible that the Commission's preemptive authority over all enhanced services has been restored by Section 10 of the 1996 Act. We do not address that issue here.

[52] Some such conversions already would be classified as basic when they either assist in the transition to new technology or assist in the provision of a switched service.

[53] In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 7 Comm. Reg. (P&F) 1209, 1316 ¶ 430 (1997) ("Access Reform Order"); appeals pending sub nom. Southwestern Bell Telephone Company v. FCC, Nos. 97-2618, et al. (8th Cir.), on recon., 12 FCC Rcd. 10119, Second Order on recon., FCC 97-368, rel. Oct. 9, 1997 ("Access Charge Reform Reconsideration Order"), Erratum, rel. Nov. 13, 1997, pet. for recon. pending, appeals pending sub nom. AT&T v. FCC, Nos. 98-1555, et al. (8th Cir.).